Supreme Court U.S.
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No. (1)

IN THE

Supreme Court of the United States

SAN PAOLO U.S. HOLDING COMPANY, INC.,

Petitioner,

vs.

LIONEL SIMON, dba LIBERTY PAPER COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF CALIFORNIA
SECOND APPELLATE DISTRICT, DIVISION FOUR

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

(i) When a punitive damage award which has been paid is determined on appeal to be constitutionally excessive and reduced from $1,700,000 to $50,000, is the appellant constitutionally entitled to an award of interest as a component of restitution of the overpayment?

(ii) Does the denial of an award of interest (here, over $925,000) to a defendant who has been forced by a court to pay a punitive damage award which is subsequently determined to be constitutionally excessive constitute an unlawful taking of property without just compensation under the Fifth and Fourteenth Amendments?

(iii) Is the mandate of this Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) and *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003) defeated when interest is not included in awards of restitution to defendants who have been forced by courts to pay constitutionally excessive punitive damage awards?

(iv) When the recipient of funds paid on a judgment or order which is subsequently reversed or modified has admittedly earned interest on these funds, should restitution include, at a minimum, all amounts earned by the recipient on these funds while in his possession?

(v) Whether this Court will issue a peremptory order which awards interest to compensate Petitioner for the loss of use of funds paid on an unconstitutional punitive damage award.

PARTIES TO THE PROCEEDING

The parties to the proceeding are Lionel Simon, doing business as Liberty Paper Company, the Plaintiff in the underlying action, and Defendant San Paolo U.S. Holding Co., Inc., the Petitioner herein. San Paolo U.S. Holding Co., Inc., is a corporation formed and existing under the laws of the State of Delaware, and is a subsidiary of Istituto Bancario San Paolo di Torino-Istituto Mobiliare Italiano S.p.A. ("San Paolo-IMI"), a banking association organized under the laws of the Republic of Italy. San Paolo-IMI operates a branch in New York, New York, under the name San Paolo Bank, which was a Defendant in this action but is not a party to this Petition.

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PETITION FOR WRIT OF CERTIORARI

San Paolo U.S. Holding Co., Inc. ("San Paolo"), returns to this Court for a third time in this case for further relief and respectfully petitions for a Writ of Certiorari to review the decision of the Court of Appeal of California, Second Appellate District, Division Four (the "Court of Appeal"). In the alternative, San Paolo requests a peremptory order which awards it interest on its payment of a constitutionally excessive punitive damage award.

OPINIONS BELOW

The Order of this Court granting San Paolo's first Petition for Writ of Certiorari, vacating the judgment of the Court of Appeal, and remanding the case for consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), is reported as *San Paolo U.S. Holding Company, Inc. v. Simon*, 121 S.Ct. 2190 (2001). (App., *infra*, G-1-2.) The Order of this Court granting San Paolo's second Petition for Writ of Certiorari, vacating the second judgment of the Court of Appeal, and remanding the case for consideration in light of *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003), is reported as *San Paolo U.S. Holding Company, Inc. v. Simon*, 123 S.Ct. 1828 (2003). (App., *infra*, H-1-2.) The decision of the California Supreme Court reversing the judgment of the Court of Appeal and modifying the judgment of the Superior Court of Los Angeles County to reduce the award of punitive damages from $1,[illegible]00 to $50,000 (App., *infra*, B-1-37) is reported at *Simon v. San Paolo U.S. Holding Co, Inc.*, 35 Cal.4th 1159 (2005).

The subsequent decision of the Court of Appeal determining that San Paolo is not entitled to recover any interest on the amount it was forced to pay Simon on account of the original excessive punitive damage award (App., *infra*, A-1-12) is unreported. The denial of San Paolo's Petition for Rehearing by the Court of Appeal (App., *infra*, C-1) is unreported. The denial of San Paolo's Petition for Review by the California Supreme Court (App., *infra*, D-1) is unreported.

JURISDICTION OF THIS COURT

On November 8, 2005, the Court of Appeal of California, Second Appellate District, Division Four, filed its most recent Opinion (unpublished) in this case. On December 1, 2005, the Court of Appeal issued its Order denying San Paolo's Petition for Rehearing. On January 25, 2006, the California Supreme Court, *en banc*, issued its Order denying San Paolo's Petition for Review. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the United States Constitution provides in relevant part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment, Section 1, of the United States Constitution provides in relevant part:

. . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

A. Introduction

As this Honorable Court is well aware, and as the Court of Appeal has acknowledged, "[t]his case has a long history." (App., *infra*, A-2.) On or about April 20, 1998, eight years ago, San Paolo U.S. Holding Company, Inc. ("San Paolo") filed its Notice of Appeal from the Judgment entered in favor of Lionel Simon dba Liberty Paper Company ("Simon"), awarding him $1,700,000.00 in punitive damages against compensatory damages for purely economic harm in the sum of only $5,000.00. Among other things, San Paolo challenged the punitive damage award as excessive under the Due Process Clause of the Fourteenth Amendment. Of the three Opinions of the Court of Appeal affirming the Judgment, two were vacated by this Court and, most recently, the third was reversed by the California Supreme Court. San Paolo's rights were vindicated, and the punitive damage award to Simon was reduced from $1,700,000 to $50,000. *Simon v. San Paolo U.S. Holding Co., Inc.*, 35 Cal.4th 1159, 1189-1190 (2005). Throughout the majority of this time, Simon wrongfully retained, refused to return, and had the use of over $2,000,000 of San Paolo's money.

Initially, San Paolo posted a bond to prevent all collection efforts. Unfortunately, after the filing of San Paolo's first Petition for Writ of Certiorari to this Court, Simon opposed San Paolo's efforts to continue the bond and demanded payment of the Judgment. As a result, San Paolo was forced

to pay to Simon the entire Judgment plus costs and interest at the rate of ten percent per annum ($2,232,194.12). Simon demanded the money, kept it, earned interest on it, and refused to return it despite the two rulings of this Court (and despite San Paolo's repeated offers of a new Appeal Bond).[1] Over four years later, the California Supreme Court filed its Opinion substantially reducing the punitive damage award from $1,700,000 to $50,000 consistent with *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* (2001) 532 U.S. 424, and other United States Supreme Court precedent. *Simon v. San Paolo U.S. Holding Co., Inc.*, *supra*, 35 Cal.4th at 1189-1190.

Simon finally delivered to San Paolo payment of the remitted amount. Despite having profited from his use of the money, Simon refused to pay any interest on the sums he had held for over four years, which, at the California statutory rate of ten percent, would exceed $925,000.00, nor did he pay the costs awarded by this Court on two occasions. Instead of seeking a ruling from the California Supreme Court, Simon filed his Motion to Determine if Interest is Owed by Plaintiff ("Motion") with the Court of Appeal just two days after the California Supreme Court issued its Remittitur. The Court of Appeal issued an Opinion granting Simon's Motion and denying San Paolo any interest on the remitted portion of the

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[1] Simon constantly refused to return the money, even after the Judgment was twice vacated by this Court. Further, Simon opposed a Motion filed by San Paolo with the Court of Appeal to compel restitution after the grant of the first Writ Petition. In taking these very aggressive acts, Simon wanted the money. In doing so, he accepted the risk that he would one day have to return it, with interest. Simply put, Simon wanted his money, compelled San Paolo to pay it and, upon receipt, refused to relinquish it under any circumstance.

Judgment which it was required but ultimately should not have had to pay. This latest Opinion of the Court of Appeal demonstrates that the Courts and litigants of this Nation are in need of clear guidance on a party's right to recover interest on funds paid on a punitive damage award which is subsequently determined to be constitutionally excessive.

B. Factual Background

As this Court may recall, this lawsuit has its genesis in the failed efforts of Simon to purchase a commercial office building (the "Property") from San Paolo. The Property was first acquired by San Paolo on January 17, 1996, through a foreclosure sale. (Reporter's Transcript ["R.T."], p. 1469, ll. 19-20.[2]) Shortly thereafter, Simon made his first inquiry relating to the purchase of the Property. Throughout the next six months, the parties engaged in three different sets of negotiations relating to Simon's attempts to purchase the Property. The closest that Simon ever came to purchasing the Property was in June 1996, when the parties prepared a written, non-binding Letter of Intent. (Joint Appendix in Lieu of Clerk's Transcript ["App."] Vol. III, pp. 1864 -1871; App. Vol. VII, pp. 1864 - 1871; R.T., p. 1475, ll. 3-25.) Although the Letter of Intent was eventually signed and Simon and San Paolo continued to negotiate the terms of the proposed sale of the Property, the transaction ultimately failed, and the Property was sold by San Paolo to a third party for less money in August, 1996. (App. Vol. III, pp. 1901-1908, 1925; App. Vol. VII, pp. 1872-1900; R.T., p. 1569, ll. 14-21.)

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[2] The Joint Appendix in Lieu of Clerk's Transcript and the Reporter's Transcripts referenced herein are part of the record on appeal below.

C. Procedural Background and Presentation of the *Federal Question*

On June 21, 1996, Simon filed his Complaint against San Paolo for Breach of Contract, Specific Performance, Breach of the Implied Covenant of Good Faith and Fair Dealing, and False Promise, all founded upon an alleged promise by San Paolo to sell him the Property. (App. Vol. I, pp. 1-18.)

On August 4, 1997, the case went to trial on the remaining causes of action against San Paolo for Breach of Contract and False Promise. Simon sought damages for not only the alleged lost value in the Property, but also the consequential damages incurred in retaining an attorney to review the transaction. (R.T. p. 1915, ll. 7-12; p. 1916, ll. 3-6; p. 1927, ll. 15-16.) The jury returned a verdict in favor of San Paolo on the cause of action for Breach of Contract and in favor of Simon on the cause of action for False Promise, awarding the sum of $5,000.00 as actual damages and nothing for the alleged lost value in the Property. In the punitive damage phase, Simon was awarded the sum of $2,500,000.00. (App. Vol. III, pp. 613-618.)

San Paolo then filed its Motions for (a) Judgment Notwithstanding the Verdict (which the trial court denied); and (b) New Trial or, Alternatively, For Remittitur of Excessive Damages. In these Motions, among other things, San Paolo asserted that the punitive damage award, which was 500 times the award of actual damages, was grossly excessive as a matter of law and violative of San Paolo's due process rights pursuant to this Court's decision in *BMW of North America v. Gore* ("*BMW*"), 517 U.S. 559 (1996) and related authorities. (App. Vol. III, pp. 634-635, 646-647; Vol. IV, pp. 1040-1044.) The trial court ruled that it would grant the Motion for New Trial unless Simon accepted the reduced punitive damage award of $250,000.00. (App. Vol. IV, p. 1050; Vol. V, p. 1228.) Simon rejected the reduced award

and elected to proceed with a new trial.

On March 9, 1998, the new trial went forward on the limited issue of the amount of the punitive damages, if any, to be awarded to Simon (the "Second Trial"). The second jury returned a verdict in favor of Simon for punitive damages of $1,700,000.00. (App. Vol. VII, pp. 1808-1815.) Thereafter, San Paolo filed a Motion for New Trial, or Alternatively, for Remittitur of Excessive Damages. (App. Vol. VI, pp. 1518-1520; Vol. VII, pp. 2010-2029.) Again, San Paolo posited that the award of punitive damages in an amount 340 times the actual damages awarded was excessive as a matter of law and violative of its federal due process rights. (App. Vol. VI, p. 1519; Vol. VII, pp. 2021-2023.) The trial court denied the Motion. Judgment was then entered on April 8, 1998, finding in favor of San Paolo on the claim of Breach of Contract; finding in favor of Simon in the amount of $5,000.00 on the claim of False Promise; and awarding Simon punitive damages of $1,700,000.00. (App. Vol. VII, pp. 1808-1815.)

On or about April 20, 1998, San Paolo filed its Notice of Appeal from: (i) the Judgment entered on April 8, 1998, in favor of Simon for punitive damages of $1,700,000.00 on a false promise cause of action where the compensatory damages were only $5,000.00 and; (ii) various rulings upon which the Judgment was based. Simon subsequently filed a Notice of Cross-Appeal as to the verdict of the first jury on his breach of contract claim, among other things.

Shortly after entry of the Judgment, Simon commenced efforts to enforce the Judgment on San Paolo's assets in New York. On or about April 28, 1998, and again on April 29, 1998, San Paolo posted bonds totaling $2,585,063.00 to secure repayment of the Judgment and accrued interest thereon at ten percent during the pendency of its appeal. On August 28, 2000, the Court of Appeal filed its unpublished Opinion affirming the Judgment in its entirety. On December

18, 2000, the Clerk of the Court of Appeal issued a Remittitur, returning jurisdiction of this case to the Los Angeles Superior Court and restoring Simon's ability to collect the excessive punitive damage award.

On December 26, 2000, San Paolo filed a Motion for Recall and Stay of Issuance of Remittitur with the Court of Appeal based upon its intention to file a petition for writ of certiorari with this Court in light of the federal constitutional issues raised in this appeal. On January 10, 2001, over Simon's Opposition, the Court of Appeal filed an Order recalling the Remittitur and staying its issuance for 90 days from the date of the order "at which time it will terminate and the matter will be remanded to the trial court." Noting that the first bond filed by San Paolo in this appeal in the amount of $2,557,500.00 "may be deficient to pay the principal amount of the judgment and the accrued interest," the Court of Appeal invited San Paolo to "apply to the United States Supreme Court for any further stay."

On March 12, 2001, San Paolo filed its Petition for Writ of Certiorari based upon, among other things, the federal constitutional issues raised by the disproportion between the amounts of the awards of compensatory and punitive damages herein. On April 10, 2001, San Paolo filed an Application to Stay Remittitur of this Court Pending Certiorari (the "Stay Application"). On April 13, 2001, Associate Justice Sandra Day O'Connor signed an Order recalling and staying the Remittitur pending receipt of a response from Simon to the Stay Application and further order of the Court. (App., *infra*, E-1.) Simon subsequently filed his Opposition to the Stay Application. On April 24, 2001, before San Paolo had an opportunity to file a Reply to the Opposition, Associate Justice Sandra Day O'Connor signed an Order vacating the stay of the Remittitur previously issued and denying the Stay Application. (App., *infra*, F-1.) Again, the same day, Simon demanded payment of the Judgment plus interest of ten

percent per annum.

Simon refused to accept a new Appeal Bond in lieu of payment of the Judgment by San Paolo. Specifically, San Paolo "agreed to post a bond issued by a secure surety in the same amount as the bonds previously posted in this matter in exchange for the return of the entire sum paid by San Paolo . . . ." Simon repeatedly rejected this offer. In light of the denial of the Stay Application and Simon's rejection of a new Appeal Bond, San Paolo was compelled to satisfy the Judgment in its entirety before its federal constitutional challenges thereto were considered by this Court. On May 7, 2001, two weeks after this Court denied the Stay Application and Simon again demanded payment, San Paolo delivered to Simon payment of $2,232,194.12 in full satisfaction of the Judgment. (Motion, Exh. "D.") Throughout the remainder of the appellate process, Simon refused to accept a new Appeal Bond and return the money. At all relevant times, San Paolo advised Simon that, in the event of a reduction of the punitive damage award, Simon would be obligated to return the excess funds plus interest at the legal rate of ten percent per annum. (Motion, Exhs. "I, "K," "T.")

On May 29, 2001, just over three weeks after San Paolo paid the excessive punitive damage award, this Court granted San Paolo's Petition for Writ of Certiorari, vacated the judgment and remanded the case for further consideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). *San Paolo U.S. Holding Co., Inc. v. Simon*, 121 S.Ct. 2190 (2001); App., *infra*, G-1-2. On June 22, 2001, and again on July 3, 2001, San Paolo demanded that Simon return its payment of the Judgment. In exchange, San Paolo offered to post a bond from a secure surety during the pendency of this appeal. As an alternative to the return of the money, San Paolo proposed that "the parties can agree to escrow all of the funds to be safeguarded until this action is finally resolved, at which time the funds will be released to

the prevailing party upon the signature of counsel for both parties." (Declaration of Mitchell B. Ludwig in support of Motion for Restitution [defined below], Exh. "I.") Simon, however, defiantly refused to allow San Paolo to post a bond or to return or even escrow the funds.

On July 30, 2001, San Paolo filed a Motion for: (1) Recall of Issuance of Remittitur; and (2) Restitution of Payment of Judgment ("Motion for Restitution") with the Court of Appeal, wherein San Paolo requested, among other things, return of its payment of the Judgment, plus the statutory rate of ten percent interest per annum, in exchange for the posting of a new Appeal Bond. Simon opposed the Motion.

On November 7, 2001, the Court of Appeal filed its second Opinion affirming the Judgment in its entirety and denying the Motion for Restitution. (Opinion filed November 7, 2001, p. 38, n. 18.) On May 20, 2002, San Paolo filed its second Petition for Writ of Certiorari in this case. On April 21, 2003, for a second time, this Court granted San Paolo's Petition for Writ of Certiorari, vacated the judgment and remanded the case for further consideration, this time in light of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *San Paolo U.S. Holding Co., Inc. v. Simon*, 123 S.Ct. 1828 (2003); App., *infra*, H-1-2.

On December 2, 2003, after further briefing and oral argument, the Court of Appeal issued its third Opinion in this case, again affirming the Judgment. On January 12, 2004, San Paolo filed a Petition for Review with the California Supreme Court. On March 24, 2004, the Petition for Review was granted. On April 7, 2005, the Supreme Court heard oral argument.

On June 16, 2005, the Supreme Court filed its Opinion, reversing the Judgment of the Court of Appeal and remanding it to that Court "with instructions that it modify the superior court judgment to reduce the award of punitive damages to $50,000 and affirm the judgment as modified." *Simon v. San*

Paolo U.S. Holding Co., Inc., 35 Cal.4th 1159, 1190 (2005). On July 19, 2005, after close of business, Simon delivered to the offices of counsel for San Paolo a check payable to San Paolo in the sum of $2,156,304.20, representing the difference between the amount paid by San Paolo in satisfaction of the Judgment over four years earlier and the reduced amount of the Judgment. The check did not include any interest or the costs awarded to San Paolo by this Court. San Paolo intended to pursue its claim for restitution before the trial court, after the Court of Appeal issued its Remittitur.

On July 25, 2005, the Supreme Court issued its Remittitur to the Court of Appeal. On July 27, 2005, just two days later, Simon filed a Motion to Determine if Interest is Owed by Plaintiff ("Interest Motion") with the Court of Appeal.[3] On August 11, 2005, San Paolo filed its Opposition to the Interest Motion. Among other things, San Paolo argued: (i) the Interest Motion should be summarily denied, as it was not proper for the Court of Appeal to adjudicate the factual and legal issues surrounding San Paolo's claim for restitution; (ii) San Paolo was entitled to restitution of the constitutionally excessive portion of the punitive damage award, together with interest from the date that it paid the award; (iii) San Paolo was entitled to recover interest at the legal post-judgment rate of ten percent per annum on the excess portion of the punitive damage award which it paid; and (iv), at an interest rate of ten

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[3] Simon made the true intentions behind this Motion clear when he asserted: "It is clear that neither Mr. Simon nor presumably this Appellate Court agrees that $50,000 was anywhere near the correct amount of punitive damages for San Paolo's conduct . . ." (Reply to Opposition to Motion, p. 6, n. 3.) By asking the Court of Appeal to deprive San Paolo of the interest on the money which it was compelled to pay to him, Simon sought to nullify the decision of the California Supreme Court, with which he and the Court of Appeal clearly do not agree.

percent, San Paolo was entitled to restitution in the sum of at least $925,743.27.

After additional briefing, on November 8, 2005, the Court of Appeal, whose three prior Opinions in this case were either vacated by this Court or reversed by the California Supreme Court, filed its Opinion granting Simon's Motion in its entirety and denying San Paolo any interest whatsoever on the excessive punitive damage award payment or the costs which it has incurred on appeal, including those specifically awarded by this Court.[4] In doing so, the Court of Appeal even acknowledged that Simon earned interest on the funds paid by San Paolo on the erroneous judgment.[5] (App., *infra*, A-6, n. 2, A-10, n. 4.) Still, no interest was awarded to San Paolo.

On November 22, 2005, San Paolo filed a Petition for Rehearing with the Court of Appeal, pointing out several omissions and misstatements of material facts and issues presented in connection with the Motion, which was denied

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[4] In granting San Paolo's two Writ Petitions, this Court awarded San Paolo $600.00 in costs which award was also disregarded by the Court of Appeal in its Opinion (ordering that "[e]ach party shall bear its own costs on appeal") and which remain unpaid to this day. (Declaration of Lawrence A. Abelson attached to Opposition to Interest Motion filed August 11, 2005 ["Abelson Decl."], ¶¶ 24, 30, Exhs. "E," "F"; App., *infra*, G-2, H-2.)

[5] According to statements provided by Simon, a portion of the funds paid by San Paolo were deposited into an account earning annual interest at the initial rate of 4.50%. (Motion, Exhs. "J," "L.") In his Motion, Simon did not account for earnings on almost one half of the funds paid by San Paolo, nor did he provide three years of statements for his earnings on the remainder. What he did provide demonstrates that he earned interest on the funds paid by San Paolo but refused to turn these earnings over in making restitution to San Paolo. (Reply to Opposition to Motion, Exhs. "A," "B.")

on December 1, 2005. (App., *infra*, C-1.) On December 20, 2005, San Paolo filed a Petition for Review with the California Supreme Court, presenting five issues for review relating to the propriety of the denial of any interest to San Paolo as part of its restitution following the reversal of Simon's constitutionally excessive punitive damage award. On January 25, 2006, the California Supreme Court, *en banc*, issued its Order denying the Petition for Review.

The jurisdiction of this Court in this case was established in San Paolo's two prior Petitions to this Court and confirmed by the two Orders Allowing Certiorari filed May 29, 2001, and April 21, 2003. As this Court stated in a case also involving a claim of restitution for sums paid under an inferior tribunal's order which had been subsequently reversed, "[t]here is no question as to the jurisdiction of this court on the first appeal or as to the validity of its mandate. The present controversy concerns the construction and effect to be given to the mandate." *Baltimore & Ohio R. Co. v. U.S.*, 279 U.S. 781, 784-785 (1929). "Moreover the proceeding below out of which the denial of restitution arose is incidental to and in effect a part of the main suit. . . . This appeal rests on the same foundation as did the first." *Id.* at 785. Here, San Paolo was compelled to pay the constitutionally excessive Judgment in favor of Simon after this Court issued its Order denying San Paolo's Stay Application on April 24, 2001. In addition, the instant restitution proceeding arose out of and is directly related to the main appeal challenging the punitive damage award as constitutionally excessive.

Further, as set forth *infra*, San Paolo relied upon federal authority (*Baltimore & Ohio R. Co. v. U.S.*, *supra*, 279 U.S. 781; *Gerald M. Moore & Son v. Drewry & Assocs.*, 945 F. Supp. 117 (E.D.Va. 1996); *Globe Indemnity Co. v. Puget Sound Co.*, 154 F.2d 249 (2d Cir. 1946); *U.S. v. Jaffe*, 314 F.Supp.2d 216 (S.D.N.Y. 2004)) in opposing Simon's Interest Motion and in support of its right to the recovery of interest.

(Opposition to Interest Motion at 16, 23.) The Court of Appeal also raised the federal issue of the applicability of the National Bank Act (12 U.S.C. § 91) to San Paolo's claim for Restitution in its Opinion. (App., *infra*, A-7-8.) The questions presented by San Paolo are therefore properly before this Court.

REASONS FOR GRANTING THE PETITION

A. Courts Require Guidance as to a Defendant's Constitutional Entitlement to Interest as Restitution Following the Reduction of a Punitive Damage Award Determined to be Constitutionally Excessive under *Cooper Industries* and *State Farm*.

This Petition provides this Honorable Court with the opportunity to assure the uniform, meaningful application by state and federal courts across this Nation of a party's right to restitution of all things lost as a result of having paid a judgment or order which is reversed or reduced on appeal. Specifically, the courts are in conflict as to the right of a defendant to the recovery of interest in connection with the restitution of a payment made on an award which is ultimately determined to be improper. This Court's intervention is required to clarify that the denial of interest is a taking and denial of due process where a defendant is forced to a pay an unconstitutional judgment or order issued by the court.

The reduction of a constitutionally excessive judgment requires an award of interest to avoid an unconstitutional deprivation of property. An unconstitutional taking occurs where a defendant is not compensated for interest which he is forced by a court to pay on a constitutionally excessive judgment. Such a defendant has indeed suffered an economic injury caused by public action which deserves compensation. *See Penn Central Transportation Co. v. City of New York*,

438 U.S. 104, 123-124 (1978); *U.S. v. Lynah*, 188 U.S. 445, 470 (1903) (inability to make reasonable return on property requires compensation under Fifth Amendment); *U.S. v. General Motors Corp.*, 323 U.S. 373, 377-378 (1945) ("property" as used in Taking Clause "is addressed to every sort of interest the citizen may possess").

This issue is directly related to the new, heightened standard of review recently mandated by this Court when passing on the constitutionality of an award of punitive damages. In light of recent decisions by this Court and its progeny clarifying the constitutional limits on, and requiring stricter scrutiny of, punitive damage awards, there is a substantial likelihood of the reduction of such awards on appeal and a concomitant increase in claims for restitution of the sums paid on excessive judgments, including interest thereon. Such sums can be significant (here, the amount in question exceeds $925,000.00). The courts of this Nation are in conflict, and both litigants and the courts require guidance on a defendant's right to recover interest in connection with the restitution of such sums in order to restore all property and rights lost by the erroneous judgment or order.

In the absence of any guidance from this Court following its decision in *State Farm*, the Court of Appeal denied an award of interest to San Paolo and prevented it from applying to the trial court for such an award. Decisions issued by this Court and other federal courts outside the realm of *BMW of North America v. Gore*, 517 U.S. 559 (1996) and its progeny (wherein this Court established firm constitutional limitations on excessive punitive damage awards) hold that, generally, an award of interest is an integral part of the restitution of funds paid on a reversed or reduced judgment. *See, e.g., Baltimore & Ohio R. Co. v. U.S., supra*, 279 U.S. 781; *Gerald M. Moore & Son v. Drewry & Assocs., supra*, 945 F. Supp. 117; *Globe Indemnity Co. v. Puget Sound Co., supra*, 154 F.2d 249; *Caldwell v. Puget Sound Elec. Apprenticeship and Training*

Trust, 824 F.2d 765 (9th Cir. 1987); *U.S. v. Jaffe*, *supra*, 314 F.Supp.2d 216. While this principle should be applied no differently to punitive damage awards which have been paid but are subsequently reduced as constitutionally excessive, the Court of Appeal made a contradictory conclusion, and there is no controlling federal authority on this precise issue.

The Court of Appeal's latest Opinion directly contradicts that of the California Court of Appeal, Fourth Appellate District, Division Three, in *Textron Financial Corp. v. National Union Fire Ins. Co. ("Textron")*, 118 Cal.App.4th 1061 (2004). There, after reducing a punitive damage award in light of *Cooper Industries* and *State Farm*, the Court was confronted with the very situation presented in this case. The Court properly held that "[t]o deny defendant recovery of interest on the excessive portion of the punitive damage award would be inequitable." *Textron*, *supra*, 118 Cal.App.4th at 1086. In this case, however, the Court of Appeal expressly dissented: "To the extent the [*Textron*] court may have meant that it is necessarily inequitable to deny a defendant interest on remitted punitive damages, we disagree." (App., *infra*, A-10; emphasis added.) In doing so, the Court of Appeal ignored the fact that Simon was forced to return 97% of the punitive damage award; Simon had the use of over $2,000,000 for over four years; and Simon repeatedly refused to return the money during that period. It is now necessary for this Honorable Court to grant certiorari in order to settle this conflict and provide guidance and uniformity in this critical area of the law.

After demanding payment of a judgment and/or refusing to accept an appeal bond, a plaintiff should not be permitted to avoid having to pay interest. Affording a lower court discretion to deny interest in determining a prevailing party's right to restitution, especially when that court is in disagreement with the ultimate decision, invites the potential for error and the nullification or disintegration of the decision

reversing or modifying the award.

Requiring the payment of interest at the rate on money judgments lets the judgment creditor be the author of his or her own fate. By awaiting a final decision before enforcing the judgment, he would not have to pay anything to the defendant, and he would receive interest at the legal rate on the portion of the judgment that was upheld. By electing to act aggressively and collect on the judgment, the plaintiff takes the risk that, should he lose on appeal, he will have to pay interest at the very same rate he could have charged had he withheld collection and prevailed on appeal.

Permitting the Court of Appeal's latest Opinion to stand denies San Paolo and other similarly situated parties the restitution mandated by the principles of due process. Due to their inability to post a bond on appeal or their unwillingness to do so (faced with the risk of having to pay post-judgment interest of 10% per annum -- the same risk plaintiffs should have to face), defendants who satisfy judgments and successfully assert on appeal their constitutional rights to a reduction thereof will be deprived of their property without any compensation. Such a situation effectively erodes the constitutional rights of those who are subjected to excessive punitive damage (and other) awards and denies the restitution to which they are entitled. It is patently inequitable to permit a plaintiff to escape liability for interest on funds which it has collected and must now be returned but, at the same time, charge the defendant with interest on such funds through the date of payment. Courts across the Nation, including this Court, have held that where a party is entitled to restitution of money paid pursuant to a reversed judgment, it is also entitled to interest at the rate payable on judgments. *See Baltimore & Ohio R. Co. v. United States, supra,* 279 U.S. at 786; *Globe Indemnity Co. v. Puget Sound Co., supra,* 154 F.2d at 250; *Gerald M. Moore & Son v. Drewry & Assocs., supra,* 945 F.Supp. at 122-123; *U.S. v. Jaffe, supra,*

314 F.Supp.2d at 224. The Restatement of Restitution is in accord. Rest., Restitution, § 74, com. d, pp. 307-308.

As this Court has instructed, when a judgment which has been paid is subsequently reversed, the defendant is entitled to restitution of "the amounts so paid by it together with interest thereon from the dates of such payments at the rate established by the law of the state in which such sums were paid." *Baltimore & Ohio R. Co. v. U.S.*, *supra*, 279 U.S. at 786. Similarly, the Second Circuit has determined that a court which has been reversed does not have discretion to deny the successful appellant interest on the amount paid on the erroneous judgment. *Globe Indemnity Co. v. Puget Sound Co.*, *supra*, 154 F.2d at 250. Specifically, the Court reasoned: "Had a correct judgment been entered Puget would have had the use of this sum during that period. It is just, therefore, that Puget should get interest, and the judgment on appeal will be modified accordingly." *Id.*

The Eastern District of Virginia has also determined that, where a judgment which has been satisfied is reversed, "the judgment creditor, is chargeable with interest on the sum received from the time of its receipt. This is the general rule."[6] *Gerald M. Moore & Son v. Drewry & Assocs.*, *supra*, 945 F.Supp. at 122, citing Restatement (First) of Restitution § 74 cmt. d, *Baltimore & Ohio R. Co. v. U.S.*, *supra*, and *Globe Indemnity Co. v. Puget Sound Co.*, *supra*. In both the civil and criminal contexts, restitution "is intended to return to the victim that which was wrongfully wrested from him

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[6] The Court reasoned: "Due to the erroneous judgment of June 10, 1994, Moore has had the use of this money since it was received. Had no judgment been entered against Drewry individually, he would have had the use of this sum during this time. It is just, therefore, that Drewry collect interest from the time the funds were actually received by Moore in satisfaction of the prior judgment." *Id.*

and, since he was deprived of the use and benefit of his funds, restitution should reflect that loss as well." *U.S. v. Jaffe*, 314 F.Supp.2d at 224. The Ninth Circuit has also affirmed the trial court's authority to grant restitution and recognized that "the right to recover what one has lost by the enforcement of a judgment subsequently reversed is well established." *Caldwell v. Puget Sound Elec. Apprenticeship and Training Trust, supra*, 824 F.2d at 767.

Nonetheless, the Court of Appeal disregarded this authority and determined that it had discretion to deny an award of interest in connection with the restitution of payment on a constitutionally excessive punitive damage award. Specifically, the Court of Appeal asserted: "[W]e reject San Paolo's contention that it is *entitled* to interest. And despite broad or ambiguous language in *Textron, supra,* 118 Cal.App.4th at p. 1086, we conclude that the equities disfavor an award of interest in this case, where Simon remains the prevailing party, remains entitled to punitive damages, albeit a reduced amount, and has not engaged in unreasonable or overreaching conduct in the collection of the original judgment." (App., *infra*, A-11.) Under the Court of Appeal's analysis, the fact that the judgment which is reduced includes an award of punitive damages affords the court the discretion to deny a defendant which has satisfied a judgment in full compensation for loss of use of the money which it should have never been compelled to pay.

In this case, San Paolo was compelled to pay over $2,000,000 (including post-judgment interest at the rate of 10%) to Simon on a grossly excessive, unconstitutional punitive damage award. Further, Simon earned interest on these funds. Nonetheless, the Court of Appeal determined that San Paolo was not entitled to any restitution or compensation whatsoever for the loss of the use of these

funds which Simon retained for over four years.[7] The result of this decision is to indirectly award Simon punitive damages of over $925,000 due to his retention for over four years of over $2,000,000 to which he was not entitled under the Due Process Clause of the Fourteenth Amendment – substantially more than the $50,000 in punitive damages authorized by the California Supreme Court pursuant to this Court's recent decisions.

For these reasons, this Honorable Court should grant this Petition to clarify the law of restitution following the reversal or modification of a judgment and ensure that the rights of defendants who are the object of constitutionally excessive punitive damage awards (and other erroneous judgments) are not eroded through the denial of interest on funds which they should never have been required to pay.

B. It Must Be Clarified that the Victims of Constitutionally Excessive Punitive Damage Awards are Entitled to Interest from the Date Such Awards are Paid.

Plaintiffs such as Simon who obtain payment on excessive punitive damage awards should be required to pay interest on the amount overpaid at their state's legal rate. The general principle requiring the restitution of funds paid under a judgment subsequently determined to be erroneous is well

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[7] At a minimum, San Paolo should have been awarded all of Simon's earnings on the excessive portion of the punitive damage award. *Stockton Theatres, Inc. v. Palermo*, 121 Cal.App.2d 616, 619- 620 (1953) (party receiving money "'under an erroneous judgment, thereafter reversed, should be required to restore what he has received . . . Restitution must be made of all that was received under the erroneous judgment . . .'")

established.[8] The courts, however, disagree on whether, to achieve this goal, restitution must necessarily include the payment of interest on what is lost by virtue of having satisfied the erroneous judgment, especially in the context of punitive damages.

Under the doctrine of restitution, defendants such as San Paolo should be entitled to recover interest from the date of payment on the portion of the punitive damage award that is constitutionally excessive in order to place them in the position they would have occupied but for the excessive award, and to restore to them "all the things lost" by reason of its coerced payment of that award. While the principles guiding the restitution analysis, including remedying the plaintiff's unjust enrichment caused by an improper award, seemingly require that the recipient of such funds pay interest thereon[9], as reflected by the Court of Appeal's Opinion, no

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[8] For example, under California law, it is clear that "[w]here a judgment or decree of an inferior court is reversed by a final judgment on appeal, a party is in general entitled to restitution of all the things lost by reason of the judgment in the lower court; and, accordingly, the courts will, where justice requires it, place him as nearly as may be in the condition in which he stood previously . . ." *Ward v. Sherman*, 155 Cal. 287, 291 (1909); internal citations omitted; emphasis added; *see also Arden Group, Inc. v. Burk*, 45 Cal.App. 4th 1409, 1416 (1996) (appellants entitled to damages from enforcement of the judgment pending appeal "in the amount necessary and appropriate to restore [the appellants] to the position they were in prior to enforcement of the judgment"); *Levy v. Drew*, 4 Cal.2d 456, 459 (1935); *Cowdery v. London & San Francisco Bank*, 139 Cal. 298, 302, 305 (1903).

[9] *See* Rest., Restitution, §74, com. d, pp. 307-308, emphasis added ("upon reversal of a judgment the payer is entitled to receive from the creditor the amount thus paid *with interest*"); *Schubert v. Bates*, 30 Cal.2d 785, 790-791 (1947) (approving and applying

such rule has been clearly established.

Recently, in light of *Cooper Industries* and *State Farm*, the California Court of Appeal, Fourth Appellate District, Division Three, held that a $1,700,000.00 punitive damage award was constitutionally excessive in comparison with the compensatory damage award of $165,414.40 and reduced it to $360,000.00. *Textron, supra,* 118 Cal.App.4th at 1085.[10] After reducing the judgment, the Court of Appeal was confronted with the same situation presented in this case:

> Defendant claims that, on June 8, 2001, subsequent to the finality of our original judgment, it paid the

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section 74 of the Restatement of the Law of Restitution); *Stockman v. Riverside Land & Irrigating Co.*, 64 Cal. 57, 59 (1883) (upon reversal of judgment, "it is but right that the amount of costs so received . . . with legal interest from the date of the receipt, be returned to respondent, to the end that the status quo be restored"); *Baltimore & Ohio R. Co. v. U.S., supra*, 279 U.S. at 786 (providing that upon reversal of judgment, judgment debtor is entitled to restitution of payments made pursuant to the judgment "together with interest thereon from the dates of such payments at the rate established by the law of the State in which such sums were paid"); *Globe Indemnity Co. v. Puget Sound Co., supra*, 154 F.2d at 250 (holding court abused discretion in failing to award interest in accordance with the "general rule" of comment d of Restatement of Restitution section 74); Cal. Code Civ. Proc., § 701.680(b) (providing that where a judgment is reversed, the judgment debtor may recover the proceeds of an execution sale "with interest at the rate on money judgments").

[10] Like the Supreme Court decision in this case, in *Textron*, a punitive damage award was held unconstitutional following remand by the United States Supreme Court with instructions to reconsider the award in light of *State Farm Mut. Auto. Ins. Co. v. Campbell, supra*, 538 U.S. 408.

> outstanding judgment when plaintiff threatened to execute on it. Citing Code of Civil Procedure section 908, defendant argues it is entitled to not only recover the constitutionally excessive portion of the punitive damage award, but interest on it from the date of payment. Plaintiff opposes the payment of interest contending it is inequitable and 'would only add insult to injury.' *Id.*

In *Textron*, the Plaintiff argued that, in light of its litigation expenses and "defendant's fraudulent conduct underlying this litigation," it would be inequitable to award interest. The Court concluded, however, that "[n]either claim supports denying restitution to defendant." *Textron, supra,* at 118 Cal.App.4th at 1086. In rejecting the plaintiff's unclean hands defense and agreeing that the defendant was entitled to interest on the amount the Plaintiff was obligated to pay as restitution, the Court of Appeal in *Textron* explained:

> The misconduct that brings the unclean hands doctrine into play must relate directly to the cause at issue. Past improper conduct or prior misconduct that only indirectly affects the problem before the court does not suffice. The determination of the unclean hands defense cannot be distorted into a proceeding to try the general morals of the **parties. . . . Defendant's fraudulent conduct occurred in the events leading to this litigation.** There is no indication it engaged in inequitable conduct in the postjudgment proceedings. **Defendant paid the judgment apparently when plaintiff threatened to execute on it. Had plaintiff chosen to await termination of the proceedings in the United States Supreme Court before seeking recovery, it would be entitled to interest on the**

> **sum finally awarded. To deny defendant recovery of interest on the excessive portion of the punitive damage award would be inequitable.** *Id.*; emphasis added.

In denying any interest to San Paolo, the Court of Appeal stated that it "disagree[d]" with the *Textron* decision. (App., *infra*, A-10.)

The status quo can be restored only through the payment of legal interest on the funds improperly collected. This principal is especially true when a punitive damage award which violates a defendant's rights under the Fourteenth Amendment is paid and later reduced. There is a clear conflict in the courts on this vital and timely issue, which necessitates this Court's intervention.

C. Courts Require Guidance on the Amount of Interest to be Awarded on the Excessive Portion of the Punitive Damage Award Which Has Been Paid.

Defendants such as San Paolo who pay constitutionally excessive punitive damage awards should be entitled to interest on the overpayment according to the statutory interest rate on civil judgments imposed by their respective states. Here, that rate is ten percent, and application thereof results in additional restitution in the sum of $925,743.27. This figure represents interest at ten percent on the excess portion of the punitive damage award from May 7, 2001 (the date of payment) through July 20, 2005 (when the money was returned).

Defendants who have been compelled to pay judgments which are subsequently reversed or reduced need a bright-line rule and certainty when seeking restitution. The only reasonable figure is the same as the rate which accrues on judgments, which in this case is ten percent. Cal. Code Civ.

Proc., § 685.010(a). That is the rate of interest that San Paolo had to pay to Simon on the portion of the judgment which was affirmed. It would be inequitable if Simon were permitted to pay a lower rate of interest on the portion of the judgment he had to return, particularly since he could have avoided paying any interest to San Paolo and would have received ten percent interest on the amount finally awarded if he had simply waited until San Paolo's appeal was fully resolved before demanding payment. *See Textron, supra*, 118 Cal.App.4th at 1086.

Defendants are forced to pay interest on judgments at a certain fixed rate (here, ten percent) even though they might be earning far less on the money. Plaintiffs should also be required to pay the same rate. Moreover, the application of this rate to a reversed judgment makes perfect sense given the inherent similarity between post-judgment interest and interest on a reversed judgment.[11]

Denying San Paolo the right to interest ignores the benefit enjoyed by Simon and lost by San Paolo during the over four years during which he had the use of San Paolo's money, which is likely much greater. Because litigating parties would never agree on rates of return on capital (or any other measure of the benefits enjoyed by the use of another party's money), states have fixed the rates which accrue on judgments, thereby precluding a case-by-case determination of the appropriate rate to be applied to a judgment. The same analysis applies here.

Courts in other jurisdictions consistently have held that, where a party is entitled to restitution of money paid pursuant to a reversed judgment, it is also entitled to interest at the rate

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[11] In California, for example, the ten percent interest rate on judgments is equally applied to the proceeds of an execution sale that must be returned following the reversal of a judgment. Cal. Code Civ. Proc., §§ 685.010, 701.680(b).

payable on judgments. *See Baltimore & Ohio R. Co., supra,* 279 U.S. at 786 (judgment debtor entitled to restitution of payments made pursuant to reversed judgment "together with interest thereon from the dates of such payments at the rate established by the law of the State in which such sums were paid"); *Gerald M. Moore & Son v. Drewry & Assocs., supra,* 945 F.Supp. at 123 ("This court finds that Drewry is entitled to restitution of the above sums . . . plus interest at the applicable post-judgment rate of interest from the dates these monies were received by Moore"); *U.S. v. Jaffe, supra,* 314 F.Supp.2d at 224 ("Restitution . . . is intended to return to the victim that which was wrongfully wrested from him and, since he was deprived of the use and benefit of his funds, restitution should reflect that loss as well. Accordingly, the statutory interest rate used for civil judgments in both federal and state courts in this district provides a more suitable remedial base . . .")

Puzzlingly, in approaching this question, the Court of Appeal adopts Simon's concept of *pre-judgment* interest. (App., *infra,* A-8-9, 11.) Not matter how it is approached, however, the interest on the overpayment, just like the interest on the Judgment itself, accrued on a *post-judgment* basis. The Court of Appeal's comments about the inability of Simon to calculate the amount which would have to be restored to San Paolo is not only irrelevant but without merit. Simon could have approached it from a conservative perspective and accepted the new Appeal Bond.[12] Instead, Simon "rolled the dice," defiantly argued that he was entitled to the entire award, compelled San Paolo to pay the Judgment, and lost.

The fact that Simon could not foresee the actual results in

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[12] Another number Simon could have considered was the $250,000.00 reduction of the first verdict which he refused to accept and gambled away in an effort to satisfy his greed for millions from San Paolo.

this case does not defeat San Paolo's right to compensation for the loss of use of its own money. In every case where a judgment is reversed or reduced, the plaintiff can make the argument that he could not have guessed that it would happen and thereby avoid payment of interest. Further, on two separate occasions, this Court reversed the decisions of the Court of Appeal affirming the punitive damage award. At a minimum, this should have been a sign that the award would ultimately be reduced. Simon, however, remained defiant.

D. In the Alternative, San Paolo Requests a Peremptory Order for an Award of Interest.

As an alternative, San Paolo requests that this Court grant this Petition, vacate the Opinion of the Court of Appeal, and remand with instructions to award San Paolo interest at the legal rate of ten percent per annum on the overpayment amount of $2,156,304.31 from May 7, 2001, through July 20, 2005, plus all costs awarded by this Court.

On May 7, 2001, San Paolo paid the entire amount due on the Judgment, including the $1.7 million punitive damage award, plus interest at ten percent (the statutory rate of interest on judgments) from April 8, 1998, the date the Judgment was entered, through May 2, 2001,[13] for a total payment of $2,232,194.12. (Abelson Decl., ¶ 19.) Because the punitive damage award was reduced to $50,000, San Paolo is entitled to restitution in the minimum amount of $925,743.27 from Simon, as follows:

Compensatory Damages:	$5,000.00
Punitive Damages:	$50,000.00

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[13] The parties agreed that interest would cease to accrue as of May 2, 2001, the date that San Paolo was prepared to tender payment of the Judgment.

Costs:	$18,374.80
Total Judgment Principal:	**$73,374.80**
Plus Interest ($73,374.80 x 0.10 x 3-25/365 [3 years, 25 days from April 8, 1998 to May 2, 2001]):	$22,515.01
Less Atha Settlement Credit:	($20,000.00)[14]
Max. Amount Due as of 5/2/01:	**$75,889.81**
Difference between Amount Paid and Amount Due on Judgment as of 5/2/01 ($2,232,194.12 - 75,889.81):	$2,156,304.31
Interest on Overpayment ($2,156,304.31 x 0.10 x 4-106/365 [4 years, 106 days from 5/7/01 {date of payment} through 7/20/05 {date of repayment}]):	$925,143.16
Costs awarded by this Court ($300.00 on 6/28/01, plus $300.00 on 3/21/03):	$600.00
Less: Payment by Simon:	($2,156,304.20)
Min. Restitution Due to San Paolo:	**$925,743.27**

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[14] This amount was paid by San Paolo some time in late 1998 or early 1999. As a result, the principal amount of the Judgment should have been reduced as of that time (less than one year from the entry of Judgment), with interest being assessed against this lower amount, not the entire amount of the Judgment, as if this money had never been paid. In any event, for purposes of responding to the Interest Motion, San Paolo calculated interest on the entire amount of the Judgment through the date of payment, without any adjustment for this payment.

CONCLUSION

For legal, equitable and procedural reasons, certiorari should be granted. The Courts of Appeal and litigants of this Nation desperately need guidance from this Honorable Court on the right to interest when awarding restitution in connection with remitted punitive damage awards. The decision of the Court of Appeal eviscerates the goal of restitution, which is to restore to the victim of an excessive judgment all rights lost as a result of the payment thereof. In light of the fact that an excessive punitive damage award violates a defendant's constitutional rights, an award of interest on the amount overpaid in furtherance of this violation is a necessity. For these reasons, it is respectfully requested that this Petition for Writ of Certiorari be granted. As an alternative, it is requested that this Court vacate the Opinion of the Court of Appeal and remand with instructions to award San Paolo interest at the legal rate of ten percent per annum on the overpayment amount, plus all costs awarded by this Court.

Date: April 21, 2006

Respectfully submitted,

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